The Central Law Journal.

ST. LOUIS, NOVEMBER 28, 1879.

CURRENT TOPICS.

The Supreme Court of Iowa in the case of *Fejavery v. Broesch*, decided on the 22nd ult., held that a covenant in a lease providing that the rent due or to grow due should be a perpetual lien upon all the crops raised and stock kept upon the premises, whether exempt from execution or not, was valid and binding. "It has been held" said the court "that the waiver of the benefit of the exemption laws in a promissory note was against public policy and void. Curtis v. O'Brien, 20 Iowa, 376. Does the case at bar come within the rule established in that case? We think not. In the cited case the contract was executory, and this court refused to enforce it because such a waiver is not recognizad by statute, and was against public policy; but the statute does recognize the validity of a mortgage on property which is exempt from execution. The validity of such a mortgage has never been doubted, nor is it material that the property mortgaged was not in existence at the time it was executed. Whatever doubts there may have been on this subject, were settled in this State in Scharfenburg v. Bishop, 35 Iowa, 60. The same principle was recognized in Brown v. Allen, Id. 306. Technically, it is said that the instrument in this case can not be regarded as a mortgage, because it does not contain a grant or conveyance of the property; but clearly, it creates a lien or equitable charge, and the right of a party to execute it, and its validity must depend on the same principle as a mortgage. What does it matter what this instrument is called? The substantial right so created is the same as a mortgage. Why may not the one be executed as well as the other? The validity of the lien should be recognized in the one case as in the other. Both may be executed by a party capable of contracting on a sufficient consideration and for a lawful purpose. There is no essential difference between a mortgage and the instrument in question unless it be in the mode of enforcement; but this does not touch or affect the question of power or validity of either instrument when executed. Such instruments, as that in the present case, have been upheld in Everman v. Robb, 52 Miss. 653; McCaffrey v. Wodin, 65 N. Y. 456; and Butt v. Ellett, 19 Wall. 545."

In *McNamee v. Minke*, which we find in the advance sheets of the last volume of the Maryland Reports, it was held by the Court of Appeals of that State, that an action could not be maintained for a false and malicious prosecution of an ejectment suit, wherein the plaintiff failed to recover all he claimed. ALVEY, J., delivering the opinion of the court said: "It is true, a party may be held liable for a false and malicious prosecution of either a criminal or civil proceeding; but when it has been attempted to hold a party liable for the prosecution of a civil proceeding, it has generally been in cases where there has been an alleged malicious arrest of the person, as in the case of Turner v. Walker, 3 Gill & John., 377, or a groundless and malicious seizure of property, or the false and malicious placing the plaintiff in bankruptcy, or the like. In the case of Goslin v. Wilcox, 2 Wils. 302, which was an action for a malicious prosecution of a civil proceeding wherein the party was arrested, it was said by Lord Camden, C. J.: 'There are no cases in the old books of actions for suing where the plaintiff had no cause of action; but of late years, when a man is maliciously held to bail where nothing is owing, or when he is maliciously arrested for a great deal more than is due, this action has been held to lie, because the costs in the cause are not sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due.' But there is a clear and well defined distinction between the actions for a false and malicious prosecution of a civil proceeding, and a false and malicious prosecution of a criminal proceeding. This distinction is stated in 1 Bac. Abr. tit. Action on the case (H,) p. 141, where it is said: 'But it must be observed, that there is a great difference between a false and malicious prosecution by way of indictment, and bringing a civil action; for in the latter, the

plaintiff asserts a right, and shall be amerced *pro falso clamore*; also the defendant is entitled to his costs; and, therefore, for commencing such an action, though without sufficient grounds, no action on the case lies.' For this the author cites Salk. 14; 3 Lev. 210; Hob. 266; 3 Leon. 138, and Cro. Jac. 432. But if the plaintiff declares that he has been falsely and maliciously arrested, or that, by reason of a false claim maliciously asserted by the defendant, he was required to give bail, and upon failure he was detained in custody, or his property was attached, there the action lies, because of the special damage sustained by the plaintiff. It is not enough, however, for the plaintiff to declare generally that the defendant brought an action against him *militia et sine causa, per quod* he put him to great charge, etc., but he must allege and show the grievance specially. Savil v. Roberts, 1 Salk. 13, 14,; s. c, Ld. Raym, 374; Goslin v. Wilcox, 2 Wils. 305, 306; Add. on Torts, 599; 4 Rob. Prac. 670, 672. Otherwise parties would be constantly involved in litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution." In Purton v. Honnor, 1 Bos. & Pul., 204, which was an action on the case to recover damages sustained in defending a vexatious ejectment, it was held, and the court expressed themselves as being clearly of the opinion, on the authority of Savil v. Roberts, 1 Salk., 14, that such an action was not maintainable. See also Potts v. Imlay, 1 South. 330. Opposed to the principles of these decisions is the case of Woods v. Finnell, 7 Cent. L. J. 48, decided by the Court of Appeals of Kentucky in 1878.

MURDER IN THE COMMISSION OF A FELONY.

Recent decisions of the Supreme Court of Missouri, giving a different construction to the law of homicide, to what it had previously received, induced some amendments to the statutory law in the revision of 1879, which went into effect on the first day of the present month. It may be useful to notice some of the more important of these amendments.

In the statutory designation of murders which shall be of the first degree, the word ,'mayhem" is substituted for the more general term, "other felony." R. S. 1879, §1232. This was done in consequence of a recent decision of the Supreme Court, in which a majority of the judges held that the term "other felony," meant some felony other than the infliction of bodily harm which resulted in death, *i. e.*, some felony of a nature similar to those specially named. State v. Shock, 68 Mo, 552, 8 Cent. L. J. 207; overruling State v. Jennings, 18 Mo. 435, and State v. Nueslein, 25 Mo. 121. The crime of mayhem is defined by statute, and consists in the dismemberment or disfiguration of the person. R. S. 1879, §1261. This amendment will aid in the proper construction of the statute, in so far at least as it reduces the number of crimes covered by the term "or other felony," to one specific felony, mayhem. It scarcely seems, however, that the former statute should be construed to refer to felonies other than the commission of great bodily harm upon the deceased. The commission of great bodily harm is a distinct felony, but it does not follow that every death which results from the infliction of great bodily harm, is murder in the first degree. The statute does not say that every homicide committed in the perpetration or attempt to perpetrate arson, etc. "or other felony," shall be murder in the first degree, although this was probably the intention; but it says that "every murder" which shall be committed in, etc., shall be of the first degree. Having no statutory definition of murder, common law murder is intended, and its connection with another felony only assigns it to the first degree. Therefore, if the homicide is murder by the common law, and was accomplished in the perpetration or attempt to perpetrate, any (felony formerly) of the felonies named, it is murder in the first degree.

What is murder by the common law? It has been variously defined to be "the wilful killing of any subject whatsoever, through malice aforethought." 1 Hawk. P. C. Cur. ed. p. 92, §3; "Unlawfully killing, etc. with malice aforethought, either expressed by the party or implied by law." 3 Inst. 47; "Unlawfully killing another of malice aforethought, either express or implied," and Mr. Bishop defines it thus: "Murder is that species of felonious killing technically known by the phrase 'wilful and of malice afore-

thought,' which proceeds from (1) an intent to take life without excuse, (2) or the intended commission of some other felony, or (3) of some misdemeanor of a sort to endanger life, or (4) the inexcusable use of a dangerous weapon, or (5) some other purpose equal in malignity," 2 Bish. Crim. Law, 6 ed. §734.

Whenever an unlawful act, an act *malum in se*, is done in prosecution of a felonious intention, and death ensues, it will be murder. 1 Russ. on Cr. 454. So where there is a general malice, or depraved inclination to mischief, fall where it may, and the act itself being unlawful, is attended with serious danger, or is done with a mischievous intent to hurt people, and death results, the killing will be murder. Id. It will be observed that malice is essential to murder—is the test without which there can be no murder at common law. It may be express or implied, actual or constructive. Lord Hale says: "Malice, in fact, is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized." Hale P. C. 451. "Express malice is said to exist when one person kills another with a sedate, deliberate mind and formed design." Whart. on Hom. §35; or "Malice may be defined as an evil intent." Id. §18; "Malice is a condition of the mind which shows a heart regardless of social duty, and fatally bent on mischief." State v. Wieners, 66 Mo. 11, 6 Cent. L. J. 70. The writer of an able article on the degrees of murder, in a former number of the JOURNAL (6 Cent. L. J. 225), gives his opinion of malice as follows: "From an examination of the whole question, upon principle and authority, I conclude that malice, as an ingredient in murder, is a condition of the mind evidenced by the intentional doing of a wrongful act, not in the 'heat of passion,' which might reasonably be expected to result in death or bodily harm to some human being." This is a good definition of malice in fact, or express malice, and perhaps more, but it falls short of defining implied or constructive malice, as recognized by law. If a man intentionally do a wrongful act, an act *malum in se*, "which may be reasonably expected to result in death or bodily harm," and death results, we draw the conclusion of malice from the act. There can not be a crime without a criminal intent, the intent must in some way be evil, but the intent need not necessarily be to do the specific wrong actually perpetrated, and, therefore, "it is a common and plain rule that whenever one does an act with the design of committing any felony, though not a felony dangerous to human life, yet if the life of another is accidentally taken, his offense is murder." 2 Bish. Crim. Law, 6 ed. §693. This is undoubtedly the law, but it does not fully accord with the general theory that the intent is the essense of the crime. There should be some logical connection between the actual intent and the act for which the party is punishable, as where the act done and intended, as in the examples generally given, was dangerous to human life, or might reasonably be expected to result in death or great bodily harm, then it would be just to infer the necessary malice. But when the felony intended was not dangerous to human life, and the death is accidental and could not have been reasonably anticipated, it looks like punishing an intent to commit an ordinary felony with the penalty attached to murder. However that may be, the law in such case arbitrarily extends the intention to the whole of the mischief actually resulting from the felonious act, and supplies the malice essential to murder as a conclusion of law, whatever the real condition of the mind may have been.

Malice as applied to a homicide has no existence at all in many felonies, such as burglary, robbery or rape, etc., at least it is not an essential element in such offenses, therefore it could not be transferred to the homicide, except by an arbitrary conclusion of law. The writer of the article referred to says that, "murders committed in the perpetration or attempt to perpetrate felonies are not murders by reason of the law attaching the intent to commit the collateral felony to the homicide, for it must be murder at the common law, and hence there must be malice independent of the intent or rather attempt to commit the felony in order that the crime may come within the particular description to constitute it murder in the first degree." There can be no murder without malice, and if the law does not extend the wrong intent or malice which is involved in the commission of the intended felony to the unintended homicide, it is not

easy to see how it, malice, gets there. Such a homicide is murder at common law, not by reason of any malice disconnected with the intended felony, but because of the intention to commit the felony, and without such intent the act would not be murder at common law. Therefore it follows that the above statement of the learned writer is not exactly correct, and that it is the presence of the intent to commit the collateral felony that constitutes the homicide murder at common law (66 Mo. 11; 68 Mo. 408,) and if the felony attempted be one named in the statutory designation of murder in the first degree, the murder is of that degree. It is so for two concurring reasons: first, because such a homicide is murder at common law; second, because it falls within the designation of murder in the first degree.

We have already stated that it was difficult to see why the former statute, or rather the phrase "other felony," should be construed to refer to felonies other than the commission or attempt to commit the felony of great bodily harm upon the deceased. The wilful and malicious infliction of great personal injury whereby death resulted was murder at common law, and such infliction of great bodily harm, being a felony, it follows that the homicide is murder in the first degree. If the great bodily harm be inflicted on sudden heat without malice, the homicide resulting would be manslaughter at common law and by statute, and consequently could not be murder in the first degree. To illustrate: Suppose A in sudden heat, upon sufficient provocation, inflicts upon B a blow or wound with a dangerous weapon, or which endangers life, he perpetrates a felony upon B, and if B dies A kills him in the perpetration of a felony, but the offense is only manslaughter, because such a killing was not murder at common law. Or, suppose A intended to inflict personal injury only, an assault and battery, not intending great bodily harm, and not using a dangerous weapon, or dangerous means, and death ensues, this would not be murder at common law, and consequently would not be murder under the statute. But suppose A in malice intended to inflict great bodily harm upon B, or intended to maim him, and B dies, this would be murder at common law. 1 Russ. on Cr. 455; 2 Bish. Cr. L § 691. 693. And it would be murder in the first degree under the statute, because it is a common law murder committed in the perpetration of a felony, and it does not alter the case that the intended felony is merged in the homicide, because there is no desire to prosecute for the felony. The doctrine of merger would absorb the felony and defeat a prosecution for it, but it cuts no figures at all in the trial of the homicide. But as the law has been changed by substituting the word "mayhem" in the place of the term "other felony," the question will not be of any consequence hereafter.

Another question may however arise under this statute. The statute declares that every murder which shall be committed in the perpetration of arson, robbery, rape, burglary or mayhem, shall be of the first degree. Every one of these collateral felonies has been enlarged by statute to embrace cases which were not such felonies at common law. We must look to the common law for the elements of murder. These felonies, as they existed at common law, or any other felony at common law, when homicide resulted, stamped it with the character of murder. Now if the homicide must have been murder at common law, should we not look alone to some felony at common law, as essential to the completion of the crime of murder, in the absence of direct malice, and a wilful, deliberate, and premeditated killing; and if such felony is also one of those named in the statute, the case is murder in the first degree; but if the homicide happens in the perpetration of a statutory felony, an act which was not felony at common law, as arson by burning something which was not arson at common law, or burglary committed in the day time, or in some manner not burglary at common law, or mayhem by disfiguring etc., when such acts were not likely to produce death, and no death was intended or could be reasonably expected, is it murder under our statute? In other words, if such a case would not be murder by the common law, would the fact that it resulted from the commission of a statutory felony make it murder?

As before remarked the statute does not define murder in either degree, but simply devides or classifies it. In some States (Ohio, and Indiana, and perhaps others) the statute provides that every person who shall kill another in the perpetration or attempt to perpetrate arson, robbery, rape, etc., shall be

deemed guilty of murder in the first degree. Under such a statute, if the killing occurred in the commission of any of those felonies as defined by statute, the case would be murder in the first degree. The supposed doubt or uncertainty in this matter grows out of the Missouri statute, in using the word murder in such a way as to assume that it had a technical legal meaning, and expressed a certain crime, and then proceeding to divide it into two degrees, connecting certain felonies with it, to assign it to the first degree, etc. The difficulty suggested may be more imaginary than real, and enough has been said to call attention to the point, so that if occasion arises the question may be raised and ruled upon, if there should appear to be anything in it in the judgment of the profession.

RIGHT TO INSPECTION OF COURT RECORDS.

RE McLEAN.

United States Circuit Court, Southern District of Ohio, November, 1879.

A citizen of the United States does not possess at common law an inherent and unlimited right to inspect the books and records of the courts; such a right exists only as allowed by statute or rule of court.

SWING, J.:

This is a petition filed by Mr. J. R. McLean and the Enquirer Company, in which they set out that heretofore, to wit, on the 7th day of November, 1879, application was made to Thomas Ambrose, clerk of this court, by J. H. Woodward, an agent of said Enquirer Company, for leave to inspect during officer hours books containing the docket and minute entries, judgments, and decrees of the said District Court and the United States Circuit Court, and that the said clerk then and there refused the said J. H. Woodward the privilege to so inspect or examine the books aforesaid. Your applicants would, therefore, respectfully ask the court to order that the judgments and decrees of said court, including the fee books and other books containing the public records and orders of said court, be open to the inspection of the said J. H. Woodward, agent of the said Enquirer Company and of said John R. McLean, under such regulations as to the court may seem proper. With this application there is filed the affidavit of one James H. Woodward, in which he says that he is employed by the Cincinnati Enquirer Company, a corporation doing business under the laws of the State of Ohio, and that acting under the orders of John R. McLean, the manager of said corporation, he made personal application to Thomas Ambrose, clerk of the United States Circuit and District Courts, for permission to examinethe public record, fee books and decrees of said court and permission was refused him by the said Thomas Ambrose, clerk as aforesaid, and said application was renewed on this day and date by him, as a citizen having the right to inspect said books, decrees and minutes, and was again refused.

To this application there is filed by the clerk a demurrer on the ground that the petition does not contain facts sufficient to entitle the applicants to the order they pray for.

This proceeding, in one sense at least, is adversary in its character, and yet it is based upon the alleged refusal by an officer of this court of permission to exercise an alleged right of the petitioner. The right which they allege was refused was that of having one J. H. Woodward to inspect, during office hours, books containing the docket and minute entries, judgments and decrees of the District Court and the United States Circuit Court. This right is based solely upon the ground that John R. McLean is a citizen of the United States and that the Enquirer Company is located in the United States. It is not claimed for either that they have any interest in the docket or minute entries, judgments and decrees recorded in said books. If the prayer of the petitioners prayed simply for the right which they claimed an officer of this court had deprived them of, there would be no difficulty in determining the case. But such is not the fact. They pray for an order that the judgments and decrees of said court, including the fee books and other books containing the public records and orders of said courts, be open for the inspection of one J. H. Woodward. It will be seen at a glance that their prayer is greatly beyond what they allege they were not permitted to examine. That was the books containing the docket or minute entries of the judgments and decrees, but this is not only that the judgments and decrees may be examined, but that all other books containing the public records and orders of the court shall be opened to their inspection. So much for the allegations of the petition itself.

But let us see how the allegation of the right which they allege they were deprived of is supported by the affidavit which has been filed. The petition says that the application was for leave to inspect the books containing the docket and minute entries, judgments and decrees. The affidavit of the man Woodward is that he applied for permission to examine the public records, fee books, and decrees, showing clearly and conclusively that the petition is not supported by the affidavit. Such is this application, as shown from the papers filed. But it is claimed that notwithstanding the variance between the allegations of the petition and the prayer, and the variance between the proof and allegations, petitioners are entitled in law to the order prayed for; that they are so entitled by the statutes of the United States, or if not by them, they are by the common law entitled to it; that all the books and papers of a court of record are subject to the examination and inspection of

any citizen, whether he have any personal interest in them or not; that it is his high and indefeasible right, at any time he pleases during office hours, to make such inspection. If this is true, it is very clear that the petitioners are entitled to the order prayed for. The doctrine is a new and strange one, and certainly finds no support in any adjudication which I have been able to find, and I am very certain none can be produced sustaining any such proposition. But the very formation, purposes and duties of a court forbid such an idea. The court is composed of judge, ministerial and executive officers, together with the attorneys that are members of it. To this body so organized are committed for determination the highest interests of the citizen in his property, his reputation and his person. And a careful record of every step which may be taken in relation to either must be carefully made; every paper connected with any proceeding affecting any one in either of these must be carefully filed and preserved. The title to the entire property of the whole country passes through the courts of this country almost in every half century. They are the repositories of the rights of persons and of property, and in many cases the only evidence of either, and the law imposes upon the court the duty of their secure and careful protection and preservation; a protection and preservation which would be greatly jeopardized if every citizen of the United States at his pleasure and will should be permitted to examine and inspect them in his own way. Not only is such an idea in opposition to the formation, purposes and duties of the court, but it is clearly in opposition to the views of the highest judicial and legislative branches of this government. At a very early day, the Supreme Court of the United States adopted a rule, known as the fourth rule, which provides that "all motions, rules, orders, and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit of equity and their solicitors." If the Supreme Court believed that all the books and records belonging to the court were open to the inspection of every citizen of the United States, why did they enact such a rule? Or why did they limit the right of inspection to parties and their solicitors? This rule itself is the most convincing proof that no such right as claimed by the petitioners was supposed by the judges of the Supreme Court to have existed.

But it is claimed by the learned counsel for the petitioners that there is a difference between suits in equity and at law; that there could hardly be a case in equity in which the government could have any interest. It is not perceived by the court upon what reason there can exist any difference in the care and custody of the records and papers in equity causes and actions at law, but learned counsel are mistaken in regard to the interest of the government in equity causes. The records of this court show numerous causes in equity in which the government of the United States is plaintiff. But it is said, if that is so, that the citizen is a party in interest, and would have a right to look into the records. In some general political sense it may be true that the citizen is a party in interest in every suit prosecuted in the name of the United States; but in a legal sense he is not such a party in interest as is contemplated by this rule.

That Congress entertained the same view is abundantly shown by its acts. In 1848 it enacted a law providing that "all books in the office of the clerks of the Circuit and District Courts containing the docket or minute of the judgments or decrees thereof, shall during office hours be open to the inspection of any person desiring to examine the same without any fees or charge therefor." If Congress believed the right already existed, why did they think it necessary to create such right by special legislation? Or if they believed it ought to exist, why did they limit the right to particular books. such only as contained the docket or minutes of the judgments or decrees? And again, by the act of February, 1875, Congress provided: "That the accounts and vouchers of clerks, marshals, and district attorneys shall be made in duplicate to be marked 'original' and 'duplicate,' and it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the treasury, and to retain in his office the duplicate which shall be open for public inspection at all times." If the public had the right already to inspect such papers, why did Congress deem it necessary to create such a right by the passage of this act?

It is, therefore, very clear to my mind that the unlimited right of a citizen of the United States to inspect and examine all the records and papers belonging to the court does not exist. The right to examine certain records and papers does exist. It exists as to the books containing the docket or minute entries of the judgments and decrees of the court, and these the petitioners allege that they have been refused by an officer of this court. The prayer of the petition is not in accordance with this averment, and the affidavit is different from both. This petition, however, must be governed by the rules of pleading in other cases, so far as the demurrer is concerned. If the party is entitled to any part of the relief he prays for a general demurrer must be overruled.

This application for the interference of the court is based upon the allegation that the petitioners have been deprived of a right given them by the law by an officer of the court. This is denied on behalf of the officer by two members of the bar, who are officers also of this court, and who appear in this proceeding on behalf of the clerk. This is a charge which the court is interested in having examined, and the truth or falsity thereof established. The demurrer will therefore be overruled, but no order will be made until a further hearing of the matter is had before the court, when we

shall finally determine whether the petitioners are entitled to the order as prayed for.

BAXTER, J., concurred.

On further consultation the judges concluded that the case was one in its nature not calling for the application of technical law, and that they would grant, *ex gratia*, what they denied the petitioner to be entitled to as a matter of right.

DIVORCE.

SMITH v. SMITH.

Supreme Court of Kansas, November, 1879.

1. DIVORCE—"ABANDONMENT"—"GROSS NEGLECT OF DUTY."—In an action by the wife for a divorce on the ground of gross neglect of duty, the testimony showed that on April 30, 1878, at his suggestion she left home for a visit at her sister's in Massachusetts; that he then purchased her a ticket and gave her sixty dollars in money, promising to send more as she needed it. She wrote for money in August, and he replied promising again to send money, but sending none. This was repeated several times, and from the time of her departure, he ceased all contributions towards her support. In fact, when he suggested the visit he intended a separation. She remained with her sister until November, when she returned, but he declined to receive her into his house, or resume marital relations with her. During her entire absence her health was poor, and in September and October she was confined to her bed and under the care of a physician. Of this he had information. He had means and was able to support her, while she had no property except a piano. There was no testimony tending to show that his conduct towards or his failure to support her was accompanied by any insult, indignity or any circumstances of aggravation or cruelty other than as above stated. Nor was there any testimony as to her present health or ability to support herself by her own labor. The action was commenced March 1, 1879. The district court refused to grant her a divorce; *Held*, no error; *Held, further*, that though the testimony shows an abandonment by him, yet the statute names "abandonment for one year" as a ground for divorce, and that a mere abandonment for less time without any circumstances of aggravation or cruelty, although it implies a total neglect of all marital duty, can not be considered as equivalent to "gross neglect of duty."

2. A PARTY WHO COMMENCES SUIT before his cause of action has accrued, can not after it accrues as matter of right file a supplemental petition showing that fact, and where the refusal of the court to grant leave to file such petition works no other hardship than delay and costs, ordinarily such refusal will not be ground for reversal.

Error from Douglass County.

BREWER, J., delivered the opinion of the court:

This was an action for divorce, and the first question is, whether the testimony, which is not contradictory, makes out "gross neglect of duty," within the meaning of those terms as used in the divorce statute. The case is thus: On April 30, 1878, plaintiff, at the suggestion of defendant, left her home in Lawrence to visit a sister in eastern Massachusetts. The defendant purchased her a ticket and gave her sixty dollars, promising to send her more from time to time. She wrote for money the first time in August, and he replied again promising money, but sending none. This was repeated several times. And he has since in no manner contributed to her support. In fact, when he suggested the visit he intended a separation, and that she should never return. She remained with her sister until the last of November, when she returned to Lawrence. During her entire absence her health was poor, and in September and October she was confined to her bed, and under the charge of a physician. On her return to Lawrence, being advised that her husband did not wish her to come to his home, she went to a neighbor's, where she continued to live until the commencement of this action. Upon an interview with her husband he declined to permit her to return to his house, and has continued to so decline. He has means and is able to support her, while she has no property other than a piano. The testimony is silent as to her present health, or her ability to support herself by her own labor. The action was commenced March 1, 1879. Upon these facts did the court err in finding that there had been no gross neglect of duty within the scope of the divorce act. We think not. The expression "gross neglect of duty" is indefinite, and it would be difficult to lay down any general rule by which every case could be determined to be within or without its limits. Each case will have to be examined by itself. And yet an examination of the whole body of the divorce act will suggest certain things as to the legislative intent in this expression. And first it is not mere neglect of marital duty; the adjective gross, whatever may be said of it as a mere term of vituperation in other relations, here has legal force as descriptive of the conduct of the party neglecting duty. If it were not so, and any mere neglect of duty were ground for a divorce, the aid of the courts might as well be abandoned, and voluntary separation permitted. There must not only be a default, but the default must be attended with circumstances of indignity or aggravation.

Again, the term "gross" can not be equivalent to the word "total." It is not the total, the entire neglect of all marital duty, which is intended by this expression. That is covered by another term, abandonment. But abandonment, which is a neglect or ommission of all marital duty, must continue for a year. That being named as one of the grounds of divorce, and the duration of such abandonment prescribed, nothing less than the time prescribed will suffice. An abandonment for one month, or ten, althought it involves a total neglect of all marital duty, is not gross neglect of duty within the stature. Something more than mere neglect, although it is a neglect of all duty, is requisite. If neglect alone is shown, it must be a total neglect, and continue for a year.

Authorities are few, yet we find these which throw some light upon the question. The statute of Massachusetts authorized a divorce, "when the husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to pro-

vide suitable maintenance for her." In the case of Peabody v. Peabody, 104 Mass. 195, it was held that the mere neglect of a husband, with no circumstances of aggravation, to provide maintenance for his wife and children for fifteen years, during which she supported the children from her own earnings, is not such gross, or wanton and cruel neglect as will sustain a libel for divorce. In Holt v. Holt, 117 Mass. 202, the evidence was that the husband left the wife without cause, remained away for ten months without providing for her, that they afterward lived together until about a year prior to the action, when she shortly before confinement went at his request to her aunt's house, and he again left her without means of support, or of paying the expenses of her confinement, and never again contributed to her support. He was able to support her, but there was no testimony concerning her ability to support herself. A divorce was refused, and the ruling sustained. This, in many respects, resembles the case at bar, though, in some features, it is stronger in favor of a divorce, and against the conduct of the husband. See also Brown v. Brown, 22 Mich. 242. Now, the testimony in this case shows abandonment, but abandonment without circumstances of indignity, aggravation or cruelty. The defendant sent his wife ostensibly on a visit to her sisters, paid her expenses and gave her a small sum for temporary support. It would seem to have been an abandonment with as little of indignity or insult as possible. She was not turned out among strangers or with nothing. No act of cruelty, no word of insult, no circumstance of aggravation. Conceding the wrong in the abandonment, that seems to have been the extent of the wrong. Her subsequent sickness does not appear to have been an anticipated one. She was not sent away in expectation of confinment, or with a babe, or in a condition of present suffering and weakness. For aught that appears in perfect health and with mutual ability to labor and support themselves they parted, he being the party seeking and causing the separation. In other words, in the matter of abandonment he was the wrong doer. But that abandonment not having lasted for a year we can not hold that the court erred in not calling it gross neglect of duty.

The other question presented arises out of the refusal of the court to give leave to file a supplemental petition. On May 19th, the testimony having been all taken before a referee and reported to the court, appplication was made for leave to file a supplemental petition alleging abandonment for one year. The application was refused. Was this error and such error as compels a reversal. We think not. We do not understand that a party may commence suit before a cause of action accrues and then after it accrues as a matter of right file a supplemental petition alleging the facts showing this. A party may not sue on a note two months before it matures and then upon maturity demand as a right the filing of a supplemental petition showing the maturity. We do not mean that a court may not allow this, or that it may never be done, but it is not a matter of right. The circumstances must be such as to excuse the premature commencement of the action and to show that the interests of justice require the change rather than dismissal of the present and the commencement of a new action. And in this, much must be left to the discretion of the trial court. Unless some greater wrong is shown than the mere matter of delay and costs, ordinarily the action of the court in refusing leave to file a supplemental petition will not be ground for a reversal. Here the action was commenced March 1, and the application for supplemental petition made May 19th, not three months thereafter. The defendant entered his appearance without summons and filed answer March 3, and the same day by consent the case was referred to a referee to take testimony. The testimony is short. So that neither delay nor expense would have been great if the suit had been dismissed and a new one commenced. Further it is not entirely clear that the proof makes out the abandonment for one year as alleged. Only nineteen days over a year had elapsed since she left Lawrence, supplied with means for present support; by her own testimony she did not call for further support till the August following. If he furnished her with support until then, can it be held that he abandoned her earlier than that. It is scarcely necessary however to decide this; we only suggest it as one reason which may have influenced the court in refusing the application.

We make one further suggestion in closing this opinion, and that is that as a rule haste in divorces is not wise. Courts should not be eager to advance or grant them; they should discourage rather than encourage them. Marriage is a contract and relation which if possible should endure, and public policy requires that there be no straining of law or facts to end the contract and sever the relation. Time will heal many estrangements and bring together those whom temporary feeling has alienated, and courts having ever in view the public good may often wisely use their discretion to give time and opportunity for reconciliation.

The judgment will be affirmed. All the judges concurring.

TOWNSHIP BONDS — VALIDITY OF ELECTION — INNOCENT PURCHASER FOR VALUE.

LIPPINCOTT v. TOWN OF PANA.

Supreme Court of Illinois.

[Filed at Springfield, Oct. 1, 1879.]

1. TOWNSHIP BONDS — INVALID ELECTION — ESTOPPEL.—Where the law authorizing a township to issue railroad bonds provides that the election shall be held at a general election conducted by the supervisors and officials of the township, and the same is held instead at a meeting of the people of the township presided over by a moderator, the bonds issued in pursuance thereof are void, even where they have passed into the hands of innocent holders, and the

town has paid interest for three years. In such a case, the town is not estopped from denying the validity of the bonds.

2. AN ELECTION IS ABSOLUTELY VOID and not voidable when it is held by persons who are not officers *de jure* or *de facto* acting under colorable authority.

3. CONSTITUTIONAL LAW— PROHIBITION.—Under the new Constitution, which prohibits a donation by a township to a railroad, except where the same has been authorized under existing laws, the vote of the people of a township taken in a manner not pointed out by law is not such an authorization under existing laws as to prevent or remove the constitutional prohibition.

Appeal from the Appellate Court of the Third District.

BAKER, J., delivered the opinion of the court:

The Pana, Springfield, & Northwestern Railroad Company was incorporated Feb. 16th, 1865. P. L. 1865, vol. 2, p. 192. The charter of said corporation was amended April 15th, 1869. P. L. 1869, vol 3, p. 330. The substance of the original act and amendment thereto, as regards the matter of subscription to the capital stock of said company by townships, was to the effect that any town, in any county which had adopted township organization, might subscribe to its capital stock in any sum not exceeding $50,000, if authorized by a vote of the people; but that no such vote should be taken unless at a regular election for town or county officers. No power was given to townships to make donations to the corporation. As the bonds here in controversy were voted and issued as a donation, and not as a subscription, and amounted to $100,000, and there is no pretense that they were voted at a regular election for town or county officers, and as they do not purport to have been issued under or by virtue of either said charter or amendment, it is not perceived that either of said acts sheds material light upon the matter of the validity of these bonds.

The act to incorporate the Illinois Southeastern Railway Company was passed Feb. 25, 1867. P. L. 1867, vol. 2. p. 750. Sections nine and ten of said charter empowered any town, in any county under township organization, to donate to said company any amount not to exceed $30,000, if a majority of all the votes cast be for such proposition, at an election which should be canvassed and returned as other regular town elections. It also required no such election should be held until the directors of said company had filed a proposition to the inhabitants of said town with the county clerk of the county wherein such town was situated, and a copy of the same with the clerk of the town, and that if there was a newspaper published in said county, then said proposition should be published in full in the same. Said statute, after providing for the posting of notices of the time and place of such election, and making other provisions in reference thereto, contained this requirement: "And such county clerk shall, upon application of the company, after the donation so voted by any such town shall have become due or payable under the terms and conditions of the proposition upon which said election was ordered, compute and assess upon all the taxable property in said town, an amount sufficient to pay such donation, or any part or installment of the same so then being due and payable, which taxes so assessed shall be collected as other taxes; and the taxes so collected shall be paid to the treasurer of said company." In Town of Middleport v. Ætna Life Ins. Co. 82 Ill. 562, it was held by this court that where a law authorizes the donation of money by a municipal corporation, to aid in the construction of a railroad, and provides for levying a tax to raise the amount to be donated, then neither such municipal corporation or its officers, have power to borrow money or to issue bonds in payment of such donation, and that bonds issued in payment thereof are void.

Moreover the sum here claimed as donated is $100,000, whereas the act expressly limited the amount and required it should not exceed $30,000, and it clearly appears the directors of the company did not make a proposition to the inhabitants of the town as required by the enabling act, and by that act they and they alone had power to initiate the election. We think it manifest this donation can not be held valid by virtue of the original charter of the Illinois Southeastern Railway Company. The charter of this latter company was amended on the 24th day of February, 1869. P. L. 1869, vol. 3, p. 308. Thereby townships under township organization were empowered to subscribe to the stock of said company, or make donations to said company to aid in constructing or equipping said railway "provided that no such subscriptions or donations shall be made until the same shall be voted for as hereinafter provided." There is nothing in this last mentioned act expressly limiting the amount of such subscription or donation and no reference thereto further than the requirement that the written application therein provided for requesting an election be held should state "the amount and whether to be subscribed or donated and the rate of interest and time of payment of the bonds to be issued in payment thereof." For the purpose of this case we may without examination admit this amendment authorized a subscription or donation to an amount limited only by the amount stated in the written application. The act among other things provided in section ten: "Such elections shall be held and conducted and returns thereof made as general elections provided by law in this State" and contained a *proviso* "that at any election held under the provision of this act it shall not be necessary to cause a registration of the voters."

The Springfield and Illinois Southeastern Railroad Company was the result of a consolidation of the Pana, Springfield and Northwestern Railroad Company and the Illinois Southeastern Railway Company. The charters of both the original and constituent corporation expressly authorized consolidations; and the general law of the State then in force provided for consolidation of railroad companies, and enacted that "said companies when so consolidated shall have all the power, franchises and immunities which said respectiva

companies shall have by virtue of their respective charters before consolidation." Laws. 1854. P. 9 §§ 1 and 2 Robertson v. City of Rockford21 Ill. 452.

We deem it unnecessary here to determine whether the amendatory act of February 24, 1869, either on the theory that it embraces the whole subject matter of the prior statute or on the theory that there is a palpable repugnancy between the two enactments, must be taken as a repeal by implication of the former statute or any of its provisions, or whether it is to be regarded as auxillary and cumulative to the old law, or simply as changing and modifying that old law in some respects. In the view we take of the case, the result in either event is the same and the inquiry is superfluous.

It appears from the record that the election at which the alleged donation with various conditions was voted to the consolidated railroad company was held at an ordinary special town meeting, presided over by a moderator, then and there chosen and sworn as such. The record of the meeting and the proceedings thereof, including the determination as to the proposed donation, and other matters submitted to it, were signed by the moderator and town clerk. The vote on the donation was by ballot.

As we have seen the amendment to the charter of the Illinois Southeastern Railway Company, required that the election should be held, conducted and returns thereof made, as general elections provided by law in this State. In counties under township organization the statute expressly provided: "The supervisor, assessor and collector of the town shall be *ex officio* judges of all elections in their town, except as otherwise provided by law." In the case of People v. Town of Santa Anna, 67 Ill. 57, the act authorizing the vote for the subscription required that "all elections had under or by virtue of this act shall be taken and held to be general elections, and conducted in the manner as provided by the law of this State, for general elections," and it appeared that the election there in question was held as a mere town meeting and was presided over by a moderator chosen at the time, and that neither the supervisor assessor nor collector participated in holding the election. We then held the election invalid, and said: "The election was conducted as an ordinary town meeting, presided over by a moderator, while the law required that the supervisor, assessor and collector, should be the judges of the election, and of course hold the same. The person chosen as moderator may have been equally competent but it is sufficient to say he was not the officer authorized by the law to discharge this duty. It is like a judicial proceeding, when there is no jurisdiction. The law required the election to be held by one set of officers, and it has been held by another. That ends the argument. The supervisor when he made this subscription had not been authorized to do so by a vote of the people taken in the manner required by law. The subscription was therefore a nullity."

In People v. Town of Laenna, Id. 65, the legislative act involved was the same as that in the case just cited, and the election was conducted entirely by the moderator and the town clerk, in the same manner as an ordinary town meeting is conducted. It was said: "The enabling act means precisely what is expressed, that the election shall be taken and held to be a general election, and have all the requisites of such an election. There must be judges and clerks, there must be a registry of voters, and all else required by the general election law." And in the same case it was further said: "The relators, when they undertook the work knew, or might have known, the manner in which the election was conducted. It was their duty to know that it was not conducted according to the law authorizing an election. It is a question of power, and the hardships or injustice of the case demand no consideration. This determines the case."

In the cases where these decisions were rendered, the bonds had not been issued, but in at least one of them equities of the complaining railroad company had intervened. The court decided it was a question of power, that it was like a judicial proceeding where there was no jurisdiction, and that a subscription based on such an election was a nullity. In this case the bonds have been issued and have passed into the hands of innocent holders, and the town has paid interest thereon for three years, and the question arises whether it and its tax payers are estopped thereby from denying the validity of the bonds.

If the bonds are absolutely void, the defence may be interposed, but if only voidable, then it may not. An election is not void when it is held by persons who are not officers *de jure* but are such *de facto*, and act in good faith, under colorable authority. Here the law provided for a board of three judges of election, and designated the supervisor, assessor and collector as such board. Had a majority of the board acted or had one of the board, together with one or more other persons assuming to act as judges of the election, presided thereat, or had three or even two persons, and they all others than those designated by law, officiated under color of an appointment however defective, and assumed to act as judges of the election, and as the board designated by law, a different question would have been presented. Perhaps there might then be ground to hold such persons to be *de facto* officers, and constituting a *de facto* board of election judges. But here there was no assumption to act as any board; there were no persons pretending to be judges of an election; there were no persons appointed or designated in any manner to take the places of the *de jure* officers, nor were there even persons who as intruders or otherwise assumed to officiate as an election board, or to be *de facto* or temporarily the officers or judges designated by law. The case is this: The law required as a condition precedent to the existence of the power to issue bonds, an affirmative vote at an election held and conducted as a general election. There not only was no such election, but there was no pretense of holding such an election. At the election held not only the officers designated by law failed to act, but no persons took upon themselves to fill their places,

temporarily or otherwise, or assumed to act and perform the duties of such officers. On the contrary, one other person who was chosen to fill another and different office, that of moderator of a special town meeting, assumed in his character of such moderator functions the law had expressly delegated to other and different officers. The election to be other than void, should have been held and conducted, if not by the tribunal designated and authorized by the statute, at least by persons assuming to act as such tribunal. It was essential to the exercise of the power conferred that there should be an election at least purporting to be held as a general election. The township had no power to substitute a town-meeting for an election. If the sheriff of a county, assuming to act only as a sheriff, should perform a duty that the law imposed exclusively upon the county clerk, it could hardly be successfully claimed that such sheriff was, in the performance of such act, a *de facto* county clerk.

One of the separate actions of the Constitution of 1870 reads as follows: "No county, city, town, township or other municipality shall ever become subscribers to the capital stock of any railroad or private corporation, or make a donation to or loan its credit in aid of such corporation. *Provided*, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscription where the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption."

We may admit a donation to be within the saving clause of the proviso. Chicago &c. R. Co. v. Pinckney, 74 Ill. 277; Middleport v. Ætna Life Ins. Co. 82 Ill. 568. Yet the inquiry becomes pertinent, what was the legal *status* of this particular donation when this constitutional provision went into force in 1870? At that time the bonds had not been issued, nor is it even claimed that the railroad company had done work or expended money on the faith of the proposed donation, or had given notice of the acceptance of the donation. It can not be claimed that there was at that time any contract between the township and the railroad company to be impaired, or any right vested in the company. Had then, this donation been authorized under existing laws by a vote of the people of the township? Plainly not. The vote had was not under existing laws. The only existing law that would authorize a donation of $100,000, required a vote of the people at an election that should be held, conducted and returns thereof made at a general election. There was no law to empower the township to vote such donation at a town meeting. As we have seen from the decisions of this court in People v. Town of Santa Anna, and People v. Town of Laenna, the election had was like a judicial proceeding where there is no jurisdiction, that there was no vote of the people in the manner required by the law, that there was no power conferred by the election, and that it was a nullity. If after the new Constitution went in force, the company had sought by *mandamus* to compel the issue of there bonds, it is evident from the cases cited, they would have had no standing in court. There was at that time not only no existing legal obligation resting upon the township, but no power in it to issue these bonds. How and by virtue of what, in 1873, did the power arise? The action taken since the adoption of the present Constitution by either the officers or the people of the township is immaterial. The power to bind had been taken away by that instrument. In 1870 the township was bound by no obligations to the company, and as there was no prior vote of the people under existing laws to authorize it to thereafter make a valid contract or donation, that which the township officers hereafter assumed to do in that regard was vain and void and of no effect. Jackson Co. v. Brush, 77 Ill, 59; Middleport v. Ætna Life Ins. Co., *supra*.

Each bond of the series recited it was one of a series amounting to $100,000, issued by said township in compliance with the vote of legal voters thereof, at an election held on the 30th day of April, 1870, by virtue ot authority conferred by an act of the general assembly of the State of Illinois, entitled an act to incorporate the Illinois Southeastern Railway Company, approved February 25, 1877, and an act amendatory thereof aproved February 24, 1869.

The purchasers of these bonds could readily have ascertained by reference to the first mentioned act that it did not authorize the donation by a township of an amount to exceed $30,000, and by reference to the last mentioned act, even if that act as claimed authorized a donation to an unlimited amount, that it required an affirmative vote of the people of the township, at an election held and conducted as a general election, and the fact that the election recited to have been held on the 30th day of April, 1870, was not and did not purport to be patent upon the face of the public records of the proceedings thereof.

It is the long established rule of this court that where there is an entire absence of power as distinguished from a defective execution of a power, then the recital of those invested with the ministerial duty of issuing municipal bonds, will afford no protection to even *bone fide* holders for value of such bonds. Force v. Town of Batavia, 61 Ill. 100; William v. Town of Roberts, 88 Ill. 13, and authorities there cited. If the bonds were issued without authority and were void, the levy of taxes and payment of interest would not render them valid. Schuyler Co. v. Farwell, 25 Ill. 181; Marshall Co. v. Cook, 38 Ill. 48.

Indeed if it be admitted that when the new Constitution went in force, there was no obligation and no power to enter into an obligation, it is difficult to perceive upon what theory or principle admission or recitals thereafter made, or acts thereafter done, created a power in the very teeth of the Constitution itself. It can hardly be that the fundamental law of the land can thus be evaded; and the ministerial officers of a municipality confer upon it, by a mere recital, a power that it is by that law explicitly prohibited from exercising.

The view we take of this case obviates the ne-

cessity of examining the numerous other points made therein, and discussed by counsel.

The judgment of the Appellate Court is affirmed.

LIABILITY OF CARRIERS FOR BAGGAGE OF PASSENGERS.

NEW YORK CENTRAL, ETC. R. CO. v. FRALOFF.

Supreme Court of the United States, October Term, 1879.

1. COMMON CARRIERS—REGULATIONS AS TO BAGGAGE OF PASSENGERS.—It is competent for a passenger carrier, by specific regulations distinctly brought to the knowledge of the passenger, which are reasonable and not inconsistent with any statute or its duties to the public, to protect itself against liability, as insurer, for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk.

2. EXTRA COMPENSATION.—As a condition precedent to any contract for the transportation of baggage, the carrier may require information from the passenger as to its value, and demand extra compensation for any excess beyond that which the passenger may reasonably demand to be transported as baggage under the contract to carry the person.

3. VALUE OF BAGGAGE—FRAUD OF PASSENGER.—The carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it is bound to assume in consideration of the ordinary fare charged for the transportation of the person.

4. DISCLOSURE OF VALUE OF BAGGAGE NOT REQUIRED UNASKED. — In absence of legislation or special regulations by the carrier, or of conduct by the passenger misleading the carrier as to value of baggage, the failure of the passenger, unasked, to disclose the value of his baggage is not, in itself, a fraud upon the carrier.

5. WHAT IS "BAGGAGE."—To the extent that articles carried by a passenger for his personal use when traveling exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer.

6. EXCESS OF BAGGAGE—LAW AND FACT.—Whether a passenger has carried such an excess of baggage is not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance as to the law of the case, and its determination of the facts—no error of law appearing—is not subject to re-examination in this court.

7. SECTION 4,281 OF THE REVISED STATUTES has no reference to the liability of carriers by land for the baggage of passengers.

In error to the Circuit Court of the United States for the Southern District of New York.

Mr. Justice HARLAN delivered the opinion of the court:

This is a writ of error to a judgment rendered against the New York, Central and Hudson River Railroad Company, in an action to recover the value of certain articles of wearing apparel alleged to have been taken from the trunk of the defendant in error, while a passenger upon the cars of the company, and while the trunk was in its charge for transportation as part of her baggage.

There was evidence before the jury tending to establish the following facts:

The defendant in error, a subject of the Czar of Russia, possessing large wealth, and enjoying high social position among her own people, after traveling in Europe, Asia, and Africa, spending some time in London and Paris, visited America, in the year 1869, for the double purpose of benefitting her health and seeing this country. She brought with her to the United States six trunks of ordinary, travel-worn appearance, containing a large quantity of wearing apparel, including many elegant, costly dresses, and also rare and valuable laces, which she had been accustomed to wear upon different dresses, when on visits, or frequenting theatres, or attending dinners, balls, or receptions. A portion of the laces was made by her ancestors upon their estates in Russia. After remaining some weeks in the city of New York she started upon a journey westward, going first to Albany, and taking with her, among other things, two of the trunks brought to this country. Her ultimate purpose was to visit a warmer climate, and upon reaching Chicago, to determine whether to visit California, New Orleans, Havana, and, probably, Rio Janeiro. After passing a day or so at Albany, she took passage on the cars of the New York Central and Hudson River Railroad Company for Niagara Falls, delivering to the authorized agents of the company for transportation as her baggage the two trunks above described, which contained the larger portion of the dress-laces brought with her from Europe. Upon arriving at Niagara Falls she ascertained that one of the trunks, during transportation from Albany to the Falls, had been materially injured, its locks broken, its contents disturbed, and more than two hundred yards of dress-lace abstracted from the trunk in which it had been carefully placed before she left the city of New York. The company declined to pay the sum demanded as the value of the missing laces, and having denied all liability therefor, this action was instituted to recover the damages which the defendant in error claimed to have sustained by reason of the loss of her property.

Upon the first trial of the case, in 1873, the jury being unable to agree were discharged. A second trial took place in the year 1875. Upon the conclusion of the evidence in chief at the last trial, the company moved a dismissal of the action, and, at the same time, submitted numerous instructions which it asked to be then given to the jury, among which was one peremptorily directing a verdict in its favor. That motion was overruled, and the court declined to instruct the jury as requested. Subsequently, upon the conclusion of the evidence upon both sides, the motion for a

peremptory instruction in behalf of the company was renewed, and again overruled. The court thereupon gave its charge, to which the company filed numerous exceptions, and also submitted written requests, forty-two in number, for instruction to the jury. The court refused to instruct the jury as asked, or otherwise than as shown in its own charge. To the action of the court in the several respects indicated, the company excepted in due form. The jury returned a verdict against the company for the sum of $10,000, although the evidence, in some of its aspects, placed the value of the missing laces very far in excess of that amount.

It would extend this opinion to an improper length, and could serve no useful purpose, were we to enter upon a discussion of the various exceptions, unusual in their number, to the action of the court in the admission and exclusion of evidence, as well as in refusing to charge the jury as requested by the company. Certain controlling propositions are presented for our consideration, and upon their determination the substantial rights of parties seem to depend. If, in respect of these propositions, no error was committed, the judgment should be affirmed without any reference to points of a minor and merely technical nature, which do not involve the merits of the case or the just rights of parties.

In behalf of the company it is earnestly claimed that the court erred in not giving a peremptory instruction for a verdict in its behalf. This position, however, is wholly untenable. Had there been no serious controversy about the facts, and had the law upon the undisputed evidence precluded any recovery whatever against the company, such an instruction would have been proper. 1 Wall. 369; 11 How. 372; 19 How. 269; 22 Wall. 121. The court could not have given such an instruction in this case without usurping the functions of the jury. This will, however, more clearly appear from what is said in the course of this opinion.

The main contention of the company, upon the trial below, was that good faith required the defendant in error, when delivering her trunks for transportation, to inform its agents of the peculiar character and extraordinary value of the laces in question; and that her failure, in that respect, whether intentional or not, was in itself a fraud upon the carrier which prevented any recovery in this action.

The circuit court refused, and, in our opinion, rightly, to so instruct the jury. We are not referred to any legislative enactment restricting or limiting the responsibility of passenger carriers, by land, for articles carried as baggage. Nor is it pretended that the plaintiff in error had, at the date of these transactions, established or promulgated any regulation as to the quantity or value of baggage which passengers upon its cars might carry, without extra compensation, under the general contract to carry the person. Further, it is not claimed that any inquiry was made of the defendant in error, either when the trunks were taken into the custody of the carrier, or at any time prior to the alleged loss, as to the quantity or value of their contents. It is undoubtedly competent for a carrier of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or its duties to the public, to protect itself against liability, as insurer, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transporation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies. It is also undoubtedly true that the carrier may be discharged from liability for the full value of the passenger's baggage, if the latter by false statements, or by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it was bound to assume in consideration of the ordinary fare charged for the transportation of the person. But in the absence of legislation limiting the responsibility of carriers for the baggage of passengers—in the absence of reasonable regulations upon the subject by the carrier, of which the passenger has knowledge—in the absence of inquiry of the passenger as to the value of the articles carried, under the name of baggage, for his personal use and convenience when traveling—and in the absence of conduct upon the part of the passenger misleading the carrier as to the value of his baggage, the court cannot, as mere matter of law, declare, as it was in effect requested in this case to do, that the mere failure of the passenger, unasked, to disclose the value of his baggage, is a fraud upon the carrier, which defeats all right of recovery. The instructions asked by the company virtually assumed that the general law governing the rights, duties and responsibilities of passenger carriers, prescribed a definite, fixed limit of value, beyond which the carrier was not liable for baggage, except under a special contract or upon previous notice as to value. We are not, however, referred to any adjudged case, or to any elementary treatise which sustains that proposition, without qualification. In the very nature of things no such rule could be established by the courts in virtue of any inherent power they possess. The quantity or kind or value of the baggage which a passenger may carry under the contract for the transportation of his person depends upon a variety of circumstances which do not exist in every case. "That which one traveler," says Erle, C. J., in Philpot v. Northwestern R. Co., 19 C. B. (N. S.), 321, "would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind will be taken in the mind of the

carrier when he receives a passenger for conveyance." Some of the cases seem to announce the broad doctrine that, by general law, in the absence of legislation, or special regulations by the carrier of the character indicated, a passenger may take, without extra compensation, such articles adapted to personal use as his necessities, comfort, convenience, or even gratification may suggest; and that, whatever may be the quantity or value of such articles, the carrier is responsible for all damages or loss to them from whatever source, unless from the act of God or the public enemy. But that, in our judgment, is not an accurate statement of the law. Whether articles of wearing apparel, in any particular case, constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling. "The implied undertaking," says Mr. Angell, "of the proprietors of stage coaches, railroads and steamboats, to carry in safety the baggage of passengers, is not unlimited and can not be extended beyond ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience." Angell on Carriers. § 115. In Hannibal Railroad v. Swift, 12 Wall. 275, this court, speaking through Mr. Justice Field, said that the contract to carry the person "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending of course, upon the station of the party, the object and length of his journea, and many other considerations." To the same effect is a decision of the Queen's Bench in Macrow v. Great Western R. Co., L. R., 6 Q. B. 121, where Chief Justice Cockburn announced the true rule to be "that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose of the journey, must be considered as personal luggage." 2 Parsons on Cont., 199. To the extent, therefore, that the articles carried by the passenger for his personal use, exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer. In cases of abuse by the passenger of the privileges which the law gives him, the carrier secures such exemption from responsibility, not however, because the passenger, uninquired of, failed to disclose the character and value of the articles carried, but because the articles being themselves in excess of the amount usually or ordinarily carried under like circumstances, would not constitute baggage within the true meaning of the law. The laces in question confessedly constituted a part of the wearing apparel of the defendant in error. They were adapted to, and exclusively designed for, personal use, according to her convenience, comfort or taste, during the extended journey upon which she had entered. They were not merchandise nor is there any evidence that they were intended for sale or for purposes of business. Whether they were such articles in quantity and value as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while traveling, was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases. It was for the jury to say to what extent, if any, the baggage of defendant in error exceeded in quantity and value that which was usually carried without extra compensation, and to disallow any claim for such excess.

Upon examining the carefully guarded instructions given to the jury, we are unable to see that the court below omitted anything essential to a clear comprehension of the issues, or announced any principle or doctrine not in harmony with settled law. After submitting to the jury the disputed question as to whether the laces were, in fact, in the trunk of the defendant in error when delivered to the company in Albany for transportation to Niagara Falls, the court charged the jury in substance, that every traveler was entitled to provide for the exigencies of his journey in the way of baggage; was not limited to articles which were absolutely essential, but could carry such as were usually carried by persons traveling for their comfort, convenience and gratification upon such journeys; that the liability of carriers could not be maintained to the extent of making them responsible for such unusual articles as the exceptional fancies, habits, or idiosyncracies of some particular individual may prompt him to carry; that their responsibility, as insurers, was limited to such articles as it was customary or reasonable for travelers of the same class in general to take for such journeys as the one which was the subject of inquiry, and did not extend to those which the caprice of a particular traveler might lead that traveler to take; that if the company delivered to the defendant in error, aside from the laces in question, baggage which had been carried, and which was sufficient for her as reasonable baggage within the rules laid down, she was not entitled to recover; that if she carried the laces in question for the purpose of having them safely kept and stored by railroad companies and hotel keepers, and not for the purpose of using them as occasion might require for her gratification, comfort or convenience, the company was not liable; that *if any* portion of the missing articles was reasonable and proper for her to carry, and all was not, they should allow her the value of *that portion*.

Looking at the whole scope and bearing of the charge, and interpreting what was said as it must necessarily have been understood both by the court and jury, we do not perceive that any error was committed to the prejudice of the company, or of which it can complain. No error of law appearing upon the record, this court can not reverse the judgment, because, upon examination of the evidence, we may be of the opinion that the

jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the court below under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action, in that particular was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties. Parsons v. Bedford, 3 Pet. 446; 21 How. 167; Ins. Co. v. Folsom, 18 Wall. 249.

It is perhaps, proper to refer to one other point suggested in the elaborate brief of counsel for the company. Our attention is called to section 4, 281 of the Revised Statutes, which declares that "if any shipper of platina, gold, gold dust, coins, jewelery, * * trinklets, * * silk in a manufactured or unmanufactured form, whether wrought up or not wrought up with any other material, furs or laces, or any of them, contained in any parcel, package, or bundle, shall lade the same as freight or baggage on any vessel, without at the time of such lading, giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof, so notified and entered."

It is sufficient to say that that section has no application whatever to this case. It has reference alone to the liability of carries by water who transport goods and merchandise of the kind designated. It has no reference to carriers by land, and does not assume to declare or restrict their liability for the baggage of passengers.

The judgment is affirmed.

Mr. Justice FIELD:

I dissent from the judgment of the court in this case. I do not think that two hundred and seventy five yards of lace, claimed by the owner to be worth seventy-five thousand dollars, and found by the jury to be of the value of ten thousand dollars, can, as a matter of law, be properly considered as baggage of a passenger, for the loss of which the railroad company, in the absence of any special agreement, should be held liable; and I am authorized to state that Mr. Justice MILLER and Mr. Justice STRONG concur in this view.

SOME RECENT FOREIGN DECISIONS.

EVIDENCE—LEGITIMACY.—The will of the father or reputed father of a person whose legitimacy is in dispute, is admissible evidence to disprove the legitimacy. *Murray v. Milner*. English High Court, Chy. Div. 27 W. R. 881.

DAMAGES—ACTION FOR FRAUDULENTLY INDUCING PLAINTIFF TO PURCHASE CERTAIN CHATTELS—MEASURE OF DAMAGES.—The defendant, by means of false representations, induced L to buy certain quantities of India rupee paper, which subsequently became depreciated in value, owing to a fall in silver, and were sold by L at a large loss some five months after the purchase. L, after the sale, discovered the defendant's fraud. In an action by L's trustee in liquidation to recover, as damages, the full loss sustained: *Held*, per BAGGALLAY and THESIGER, L.JJ., diss. BRAMWELL, L.J., that the measure of damages was the difference between the price paid and the price which could have been obtained by the purchaser if he had re-sold the rupee paper on the same day as that on which he purchased it. Per BRAMWELL, L.J.: The measures of damages was the difference between the price paid for the rupee paper and the price at which it could have been sold by the purchaser in reasonable quantities and with due caution within a reasonable time of the purchase.—*Waddell v. Blockey*. English Court of Appeal., 27 W. R. 931.

PLEDGE—SPECIAL CONTRACT — DELIVERY UP OF PLEDGE BY PLEDGEE ON TERMS OF CONTRACT—FRAUD OF PLEDGOR — SUBSEQUENT BONA FIDE TRANSFEREE FOR VALUE — TWO INNOCENT PARTIES.—1. D and Sons deposited flour with the plaintiffs as security for money lent upon acceptances, and gave a memorandum to them in these terms: "As security for the due fulfilment on our part of this undertaking we have warehoused in your name sundry lots of flour, and, in consideration of your delivering to us or to our order said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt." The defendants, in ignorance that the flour was deposited with the plaintiffs, agreed to advance £2,500 on it as security, on condition that they should have absolute possession of it with power to sell it. In order to give the flour into the possession of the defendants, one of the firm of D & Sons fraudulently represented to the plaintiffs that the flour was sold to the defendants, and the plaintiffs believing that representation gave a delivery order to D & Sons. The defendants had on the same day, but previously to D & Sons receiving the delivery order, in pursuance of their agreement, paid to D & Sons part of the £2,500, and they paid the remainder the next day. Subsequently the plaintiffs caused the room in which the flour was deposited to be transferred to the defendants. The defendants, acting under their power of sale, sold the flour and received the purchase-money. The plaintiffs sued them for the wrongful conversion of the flour. *Held*, that the plaintiffs having delivered up the flour under the special contract, the special property of the plaintiffs in it was at an end, and although the surrender might, as between the pledgors and the pledgees, have been revoked, yet the goods having before any such revocation been transferred by the owners for good consideration to the defendants, *bona fide* transferees, they acquired an indefeasible title. 2. Where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud.—*Babcock v. Lawson*. English High Court, Q. B. Div., 27 W. R. 886.

ABSTRACTS OF RECENT DECISIONS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

October, 1879.

FIRE INSURANCE—ILLEGAL BUSINESS.—In an action upon a policy insuring the plaintiff's billiard tables, balls and cues, bar and saloon fixtures, furniture and pictures, and stock in trade, chiefly liquors and cigers, including glass and other ware, in Franklin Hall, it appeared that a license in due form, under statutes of 1875, ch. 99, had previously been issued to J, one of the plaintiffs, "doing business at Franklin Hall, to sell, expose or keep for sale until May 1, 1876, spirituous or intoxicating liquors to be drank on the premises." No other license had been granted, nor had either of the plaintiffs any license to keep a billiard table for hire, gain or reward under Gen. Stats., ch. 88, § 69. It was admitted that said billiard tables were kept by the plaintiffs for that purpose. *Held*, that the keeping of the billiard tables for hire and of the liquors for sale being carried on as one business, and the policy being illegal as to the former at least, the whole contract was void. Opinion by GRAY, C. J.—*Johnson v. Union M. & F. Ins. Co.*

PROMISSORY NOTE—PAYEES—PARTIES.—1. An instrument in the form of a promissory note whereby the maker promises to pay "the trustees of the Methodist Episcopal church or their collector," is properly described as such, and does not come within the class of cases in which instruments otherwise such in form are held not to be such, because made payable in the alternative to either of two persons named. Osgood v. Pearson, 4 Gray, 455. The rule applies where two persons are strangers to each other, but not when the instrument discloses the fact that one of the two persons named is agent for the other to receive the money. Holmes v. Jacques, L. R. 1 Q. B. 375. In the case at bar, it is evident that "their collector" is merely a person authorized by the payee to receive the money in its behalf. 2. A suit on such note can not be maintained by two only of the board of trustees who have been appointed a collection committee authorized by the board to collect said note by suit or otherwise. Wiggin v. Cummings, 8 Allen, 353. Opinion by SOULE, J.—*Noxon v. Smith.*

FALSE IMPRISONMENT — LIABILITY OF MAGISTRATE—EXCESSIVE SENTENCE.—On the trial of an action of tort for false imprisonment it appeared that that the plaintiff had been brought before the defendant, a trial justice, on two complaints. One charged him with keeping a disorderly house. Upon this he was found guilty and sentenced to confinement in the house of correction for the term of twelve months. The other was for illegally selling intoxicating liquors, and upon this he was found guilty and sentenced to pay fine and costs, and to stand committed until the sentence was performed. The plaintiff did not pay the fine and costs. The defendant thereupon issued two warrants of commitment, and delivered them to a deputy sheriff, who committed the plaintiff to the house of correction, delivering the warrants to the master thereof, who held the plaintiff in his custody under both of said warrants during the whole term of his imprisonment. The proceedings upon both complaints were regular, except that the power of a trial justice extends only to an imprisonment for a term not exceeding six months. The magistrate had jurisdiction of the subject-matter of the complaints and of the person. The court directed the jury to return a verdict for the plaintiff, and required them to find: 1st. What damage the plaintiff had sustained by his imprisonment under the warrant for his imprisonment for twelve months, if he was rightfully retained during the whole time under another warrant? 2d. What damages the plaintiff had sustained if his imprisonment was wholly illegal? The jury found, in answer to the first question, the sum of one dollar; in answer to the second question, the sum of one hundred and twenty-five dollars. The question as to which amount the plaintiff was entitled to recover was submitted to the determination of the court. *Held*, that the defendant, if liable at all, was liable only for nominal damages. Opinion by MORTON, J.—*Doherty v. Munson.*

SUPREME COURT OF INDIANA.

October, 1879.

JUDGMENT — PLEADING — UNNECESSARY AVERMENTS.—In pleading a judgment it is not necessary to allege, in addition to the averment of its recovery, that it still remains in full force, or has not been set aside, vacated or reversed. Although it is quite usual to aver that the judgment is in full force, unreversed and unappealed from, such averments are needless. If the judgment has ceased from any cause to be of binding force, or if its operation has been suspended to any extent, these are matters of defense. Affirmed.—*Green v. Rafles.*

PLEADING — ARGUMENTATIVE DENIAL — PRACTICE.—This was a suit against appellants to recover from them personally as stockholders in a certain corporation. The second and third paragraphs of defendant's answer alleged that the debt in question was one contracted before the defendants became members of the corporation, and it is insisted that because of these allegations the demurrer to these paragraphs should have been overruled. *Held*, that these allegations were but an argumentative denial of what the plaintiff was bound to prove under the general denial which was filed, viz.: that the defendants were members of the company at the time the debt was contracted. The matter thus pleaded could have been given in evidence under the general denial, and, therefore, it was not fatally erroneous to sustain the demurrer. The withdrawal of the general denial afterwards could not make a ruling erroneous which was not so at the time it was made. Affirmed.—*Reeder v. Moranda.*

CONVEYANCE BY HUSBAND TO WIFE — FRAUD — CONSIDERATION.—Action by appellants to set aside as fraudulent a conveyance made by Loehr to his wife. On the trial the court instructed the jury that a husband may convey his property to his wife without consideration, and for the purpose of defrauding his creditors, and that the wife will hold such property under any and all circumstances, if she had not knowledge at the time of the fraudulent purpose of her husband. *Held*, that the instruction did not state the law. A conveyance of land to an intended wife in consideration of marriage is upon a valuable consideration. 56 Ind. 538. But a mere voluntary conveyance of property by a husband to his wife after marriage, not in fulfillment of a contract made before marriage, is not upon a valuable consideration, and such conveyance will not be upheld if fraudulent as to creditors. But to avoid it, it must be shown that the husband had not sufficient property subject to execution left to pay his

debts. 56 Ind. 34; 57 Ind. 374; 60 Ind. 555. Reversed.—*McCole v. Loehr.*

STATUTE OF FRAUDS—INSUFFICENT MEMORANDUM—REFORMATION OF.—Action by appellees against appellants upon an open account. Appellants answered that they had purchased certain goods of appellees, through the agent of the latter, on a credit of sixty days; that a memorandum of the purchase had been executed in the following form: "Terra Haute, Ind., 187—. A. P. Lee & Bro." [Then follows a list of the goods.] "Freight. Ship Emp. Line, 60 days acceptance." Signed "Hills Bros. per E. F. Lock, April 21, 1875;" that by mistake the word sold was omitted from before the firm name of appellants, and praying for a reformation of the memorandum in this respect, and asking a set-off for damages for appellees' failure to ship the goods. A demurrer was sustained to the answer. *Held*, that a memorandum, to be sufficient within the statute of frauds, must state the contract with such reasonable certainty that its terms may be understood from the writing itself without recourse to parol proof. 50 Ind. 145; 39 Ind. 90. And the alleged mistake can not be reformed as asked by appellants. Parol evidence could not be received to supply the omitted fact in the memorandum. Affirmed.—*Lee v. Hills.*

SUPREME COURT OF WISCONSIN.

October, 1879.

AUTHORITY OF COUNCIL TO BUILD AND MAINTAIN PIER—DELEGATION.—Complaint that by certain acts of the legislature the defendant city was authorized to construct a pier into Green Bay and a road thereto from the city limits, and to keep the road in good repair, and the mayor and common council of said city were empowered to fix, regulate and collect tolls upon said pier; that the city having constructed such pier and road, the common council leased the pier to plaintiff for one year, for a specified sum; that by said lease plaintiff acquired the valuable privilege of charging commissions for all merchandise and freight landed at or shipped from said pier, which amounted to a specified sum for the year previoust o the action; and that, by reason of defendant's neglect to maintain said road in good sepair, plaintiff had suffered damage by loss of tolls or commissions for the use of said pier, in a sum named. *Held*, on demurrer, 1. That as there is no averment that the mayor and common council, or the plaintiff under his lease, had ever fixed and regulated the tolls upon the pier no damage is shown; 2. That the power of the common council to regulate the tolls could not be delegated and the lease was void. Opinion by ORTON, J.—*Lord v. City of Oconto.*

PARTNERSHIP—EVIDENCE OF.—1. A chattel mortgage in the usual form from A to B, is not evidence tending to show the existence of a partnership between them at its date. 2. In an action to charge two persons as partners, if plaintiff shows that a partnership existed between them at a certain time, and was known to the public at the place of business of the firm, and that no notice of dissolution was ever given, he may further show that at the time of the transaction in question such partnership was generally reputed to continue, and that the debt was contracted in the firm name and upon the credit of the firm though after a dissolution in fact, it being then for the jury to determine whether the retiring partner had so acted after the dissolution as to hold himself out as still a partner, and had thus rendered himself liable. So *held*, where the firm name was the same as the individual name of the person who continued the business, and where the plaintiff had never done business with the firm during its actual existence. Opinion by TAYLOR, J.—*Benjamin v. Covert.*

NEGOTIABLE PAPER—COMPROMISE OF CLAIM—TRANSFER TO BONA FIDE HOLDER—PRACTICE.—1. In an action upon two promissory notes, by a second indorsee, after the notes, duly indorsed, had been put in evidence, the evidence for defendant was, that after one of the notes fell due, and before maturity of the other, the payees attended a meeting of the maker's creditors to consider the question of a compromise, and stated the amount of their claim, including the notes in question; that several days afterwards a compromise in writing was signed by said payees and other creditors, by which they agreed to take forty per cent. in discharge of their claims, in case all the creditors should sign the agreement; but said payees did not at that time state the amount of their claims. One of the payees then testified for plaintiff that they sold and delivered the notes to the first indorsee one or two days before the date of the written compromise, for about seventy per cent. of their face. There was no evidence that such payees had agreed with the other creditors, or with defendant, to sign the compromise before they actually signed it. *Held*, (1) That independently of the evidence, the presumption was that the notes were negotiated before due. (2) That the compromise signed by the payees after negotiating the notes did not affect the rights of the purchaser or his indorsee. (3) That subsequent declarations of the payees that they held the notes at the time of signing the compromise would not be admissible in evidence against plaintiff. (4) That the failure of the payees to disclose the fact that they had negotiated said notes, at the time of signing the compromise, did not throw upon plaintiff the burden of showing that he purchased in good faith and for value; such notes being valid against defendant for their full amount even in the hands of the payees, at the date of their negotiation. (5) That an oral agreement by the payees, before the negotiation of the notes, to sign the compromise of their entire claim, including such note, if made, and if binding in law, would not have defeated plaintiff's right to recover the whole amount of the note negotiated before maturity, without knowledge on his part of such agreement; nor would it have thrown upon him the burden of proving the absence of such knowledge. (6) That upon the evidence plaintiff was entitled to recover the full amount of both notes. 2. When a motion for a new trial has been granted, the moving party may waive his right under the order, without prejudice to his right to appeal from the judgment afterwards entered. Opinion by TAYLOR, J.—*Gutwillig v. Stumes.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, October, 1879.]

REHEARING — POINTS NOT MADE IN ORIGINAL ARGUMENT OF CASE NOT ALLOWED ON PETITION FOR REHEARING.—This case was before the Supreme Court at a former term. The judgment was reversed and the cause remanded, on the ground that the circuit court had improperly sustained a demurrer to the second plea. In the original argument of appellee the only objection taken to the plea was that the pleader had failed to state specifically the facts relied

upon as a defense, but it was however held that the plea was sufficient, as it was merely a plea of want of consideration. In the petition for a rehearing it is now insisted that the demurrer was properly sustained, for the reason that the plea professed to answer the whole declaration, when it only answered the special count therein. Per CURIAM. "This objection to the plea, if appellee relied upon it, should have been brought to the attention of the court when the case was submitted for a hearing. A new question will not be entertained when raised for the first time on a petition for a rehearing. This question arose in Fuller v. Little, 61 Ill. 21, and it was there held, when a case has been argued and decided on the point presented, a rehearing will not be granted on new questions raised for the first time in the petition, unless it is to prevent manifest injustice. Petition for a rehearing must be denied."– *Sheldon v. Lewis.*

ADMINISTRATION — PAYMENT OF LEGACIES — RIGHT OF LEGATEE TO CLAIM INTEREST. — This proceeding was commenced in the county cour t of Kane county by certain legatees to compel the executors to pay them the full amounts of the several legacies to which they were entitled under the will of Wm. Ruske, deceased. On the hearing, proof was made of the condition of the estate, and the court ordered the executors to pay the legacies demanded with interest at the rate of ten per cent. per annum after six months from the issuing of the letters testamentary. The executors then appealed from so much of the order as required them to pay interest, and the same was successively reversed by the circuit and appellate courts. The demandant now brings the case to this court on appeal. SCOTT, J., says: "By the express terms of the will the several legacies claimed by demandants were to be paid when the estate of the testator 'shall be settled.' The record before us does not show that the estate was settled when this application was made. Proof was made that it would have been practicable for the executors to have collected enough money belonging to the estate with which to have discharged all legacies. That is not a matter of any consequence, so far as this decision is concerned. Two years had not elapsed from the date of issuing of letters, and the executors had not nor were they bound to make final settlement of the estate before the expiration of that period. The testator chose to make his bounty payable on the happening of a certain contingency, viz.: the settlement of his estate, and the beneficiaries under his will could not sooner demand it. As no settlement of the estate had been made before this proceeding was commenced, it follows that the legatees could not rightfully demand the bequests due to them in the will, and if they could not claim the principal of such bequests, of course they could not demand interest for the detention." Affirmed.— *Valentine v. Ruske.*

HABEAS CORPUS — CONTEMPT OF COURT — IMPRISONMENT FOR INDEFINITE TIME.— On the 20th of September, 1879, it appears that the attachment and other papers under which one H had previously been arrested for a contempt were returned, and he was brought into court. The court heard evidence and adjudged H to be in contempt for refusing to surrender the books, papers and money in his hands, as receiver of the railroad, to the receiver who succeeded him in the management of the road. The court thereupon ordered that he stand committed in the county jail until the further order of the court, and that a *mittimus* should issue for that purpose. The sheriff now returns that he holds him under that writ. Opinion Per CURIAM: "It is contended that this judgment is too indefinite to be legal or binding. It does not order his committal for a specified time, or until he surrendered the books, etc. It in effect was a commitment during the pleasure of the court. And it was not a commitment to compel a surrender of the property or in aid of the attachment. It was an imprisonment for disobeying the order of the court as punishment for contempt for so refusing. All judgments must be specific and certain. They must determine the rights recovered or the penalties imposed. On s uch a judgment as this, the appellate court can not know the duration of the imprisonment and determine whether the confinement is reasonable. Whether it is to extend to days, weeks, months, years, or for life, none can certainly know. That is still in the breast of the Judge. Had this order been simply erroneous, we could have no power to discharge. In such a case, error or appeal is the only remedy but it is otherwise when the judgment or process is void. In the case of King v. James,, 5 B. & Ald. 894, the prisoner was committed for contempt until he should be discharged by due course of law. It was there held that the warrant was bad, because he was not committed for a time certain. We think that decision correct, and the rule announced must govern this case. We are therefore authorized and required to discharge the prisoner under the third clause of the 22d section of the habeas corpus act." Prisoner discharged.—*People v. Piepenbrink.*

REDEMPTION—SALE ON EXECUTION—ASSIGNMENT OF CERTIFICATE OF SALE.—The contention is whether defendant under the facts as they appear in the record, about which there is no controversy, could rightfully redeem the property from the execution sale to Gallup. That question is definitely settled by the former decision of this court against the position taken by complainant. When the redemption was made from the former execution sale by the junior judgment-creditor a period of twelve months, but not fifteen months, from the sale to Gallup had expired. No one claiming to own the property had redeemed the property in the mode provided in the statute. Had the title remained in the judgment debtor, Chase, it would doubtless be conceded his right to redeem had been barred by the lapse of time. Complainant was assignee of Chase, having succeeded to the title that was in him, and therefore stood in the shoes of the judgment-debtor, with the same right, but no other, to redeem the property from the execution sale on the judgment in favor of Gallup. His right to redeem, as well as that of his grantor, was barred after the lapse of twelve months from the date of the sale. It is apprehended it can make no possible difference whether complainant became the owner of the title that was in the judgment-debtor before or after the execution sale. In either case his rights are precisely the same. Failing to redeem their property within twelve months from the time of sale, he would be forever barred that privilege, and any judgment-creditor of the former owner, by electing to do so within three months after the expiration of twelve months, could redeem the property from the former execution sale, on the conditions and terms provided in the statute. That is precisely what defendant did in this case, and, having acquired a title in that way, no reason is perceived why it should not prevail. The only thing suggested against it is that prior to the expiration of twelve months from the sale of the property on the execution issued on the judgment in favor of Gallup v. Chase, complainant had purchased the certificate of sale from Gallup and took an assignment of it to himself, and the argument is that any payment of the Gallup claim, without reference to the mode of doing it, relieved the property from the lien which the judgment created upon it. The former decisions of this court present a full and complete answer to the position taken, and it is not necessary now to re-state the

reasons that led to the conclusions reached. Lloyd v. Kames, 45 Ill. 63; McRoberts v. Conover, 71 Ill. 524. It is definitely settled in the cases cited that taking an assignment of the certificate of sale, although to a party entitled to redeem it, is not a redemption of the property under the statute, and any one having a judgment against the debtor whose property was sold, may redeem from such sale within the period limited by the stature on complying with its terms. The correctness of the decisions referred to is not questioned, but an effort is made to distinguish the case at bar on the ground complainant became assignee of the title that was in the judgment-debtor, before any sale of the property was made on the judgment that was a lien upon it. That as we have seen can make no difference. He is assignee of the judgment-debtor and has such rights in the premises as his grantor had and no other. Severe denunciation has been indulged upon the harshness of the results that may flow from the rule adopted; but, when rightly understood, no disastrous consequences follow its application. Complainant had twelve months in which to redeem from the sale under the execution issued on the judgment that was a prior lien upon this property bought of the judgment debtor, and had he availed himself of that privilege the title he obtained whatever it was would have been free from the lien of the junior judgment. Omitting to exercise the right secured to him by law that would have fully protected his interests in the property, he has no cause to complain of consequences that may flow from his own neglect, for some reason satisfactory to himself; and it is not necessary to the decision to inquire what it may have been had he chosen to take an assignment of the certificate of sale to himself. That was no redemption of the property and defendant could rightfully redeem the property under the statute, and having acquired a title in that way it is superior to all others and must prevail." Affirmed Opinion by SCOTT, J.—*Moone v. Hopkins.*

SUPREME COURT OF OHIO.

December Term, 1878.

[Filed November 18, 1879.]

PROMISSORY NOTE—DEMAND AND NOTICE—EVIDENCE—WAIVER—CREDIBILITY OF WITNESS.—1. Oral testimony is admissible to prove that the indorser as between himself and the indorsee, at the time of indorsing a note in blank, waived demand and notice. 2. A waiver of demand of payment at the maturity of the note is also a waiver of notice of non-payment. 3. The uncorroborated testimony of a witness who wilfully testifies falsely to a fact material to the issue, may be rejected by the jury as unworthy of credence. Judgment of the district court reversed, and that of the court of common pleas affirmed. Opinion by GILMORE, C. J.—*Dye v. Scott.*

FIRE INSURANCE—CONDITION AGAINST SUBSEQUENT INSURANCE.—1. A condition in a fire policy against subsequent insurance, is not broken by the taking of subsequent policies by the insured which never took effect by reason of conditions therein contained. 2. The receipt of payment on such subsequent void policies, is not matter of defense in an action on the prior policy. Judgment affirmed. Opinion by GILMORE, C. J. — *Fireman's Insurance Co. v. Holt.*

DEATH OF PARTY TO JUDGMENT—REVIVOR.—1. Where a party to a judgment dies before the commencement of proceedings in error, one who becomes a privy to the judgment by operation of law, may file a petition in error without being first made a party by revivor. 2. In such case, the facts, upon which the law operates in creating the privity, must be averred in the petition in error; and the facts so pleaded are issuable and must be verified as required by section 46, ch. 7. div. 2, title 1 of the Code of 1878. (75 Ohio Laws, 624.) Motion granted. Opinion by MCILVAINE, J.—*Hanover v. Sperry.*

PROMISSORY NOTE—TRANSFER—PRINCIPAL AND SURETY.—1. A promissory note containing the words, "I promise to pay to the order of myself," having been signed by two persons and placed by one of them in the hands of the other to be by him put in circulation for his own benefit, the latter may, before the note is due, by indorsing his name thereon, invest a *bona fide* holder with a complete title thereto, although the name of the other maker is not so indorsed. 2. In violation of an agreement between principal and surety in a promissory note, the principal transferred the note, before due, as collateral security for an extension for ten days in the time of payment of a protested draft for a less amount, the person receiving the collateral acting in good faith, and having no knowledge of such agreement—*Held*, that the title of such holder, to the extent of his draft, is valid, assuming the facts to be as stated. Judgment reversed. Opinion by OKEY, J.—*First National Bank v. Fowler.*

CORRESPONDENCE.

PUBLICATION OF NOTICES.

To the Editor of The Central Law Journal:

In No. 19, vol. 9 CENTRAL LAW JOURNAL 361, you cite *Dexter v. Cranston* lately decided in our Supreme Court, as deciding that an affidavit of publication of notice of sale was held good which set forth the notice to have been "published in a newspaper published and circulated in the county," and which did not state that the newspaper was *printed* in the county. The quotation made by you from said opinion seems to sustain your assertion. While our Supreme Court may hold good an affidavit not alleging the printing of the paper within the county, still I am of the opinion that the case above cited does not so decide, nor was it so intended. On the contrary the clause in said opinion immediatoly following your quotation shows that the court found the fact that said newspaper was printed within the county. Said clause is as follows: "The record in this case shows that the Probate Court, by an order, designated the paper in which the notice of sale should be published, *viz.*, 'in the Livingston Republican, a newspaper printed in the county.' So that an examination of the record shows the notice was published in a newspaper printed, published and circulated in the county in which the lands were located and sold. This, we think, was a sufficient compliance with the statute." ALBERT H. STANDISH.

Grand Rapids, Mich.

QUERIES AND ANSWERS.

QUERIES.

43. A SUED B FOR RENT and possession under the landlord and tenant act of Missouri; had judgment for $39 rent and possession. Execution issued by justice of the peace and delivered to constable commanding: 1st. the delivery of the premises. 2d, the making of the money, and returnable on its face in five days. Is that execution void absolutely, or can ac-

tion be maintained against the constable for failure to deliver possession? Does the command to deliver possession in five days depend at all on the command to make the money? Can the latter be a void command and the former a valid one? C.

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44. A MARRIED WOMAN, trading in cattle, running a rented saw mill, etc., has no real estate; husband insolvent, but as agent for wife, manages her business. The personal property is changing too rapidly to get any special judgment against any particular thing. Now, if no general judgment can be rendered against her as a married woman, and no special judgment can be rendered against her specific property because of its constant change, how can a debt be collected against her as our law now stands? There is no trustee in which any title is vested, and no permanent fund; but plenty of personal, and constantly changing property. E.

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45. A CONVEYS TO B A TRACT OF LAND, receiving part purchase-money in cash, and for balance takes three notes of B, secured by his deed of trust on the property. B being unable to pay this purchase-money, offers to reconvey to A upon condition that he return notes and cancel deed of trust, which A accepts, taking warranty deed from B, which he delivers to his agent C to have recorded. A goes home, and being taken sick, fails to return notes or have satisfaction entered, and B apprehensive goes to C and gets him to withhold recording deed until A returns notes, etc., which he consents to. During this time A dies; sometime after which C has deed recorded. In whom is the title, and can A's administrator sell under deed of trust? A. Y.

ANSWERS.

No. 42.

(9 Cent. L. J. 419.)

It seems that in the absence of any statutory regulation on the subject in the State where the notary derives and exercises his authority, any device upon which are engraved words descriptive of his office, and the name of the county and State of his residence, constitutes a sufficient official seal, without the stamping of the notary's name thereon. *In re* Phillips, 14 Nat. Bkcy. Ry. 219. What a notary's seal shall contain is regulated, however, by express legislation in many of the States. W.

No. 39.

(9 Cent. L. J. 376.)

I am not acquainted with the Pennsylvania decisions on the subject of wills, but would answer this query on general principles as follows:—The child would not inherit directly from the widow. The widow had but a life estate, at best, and left nothing for any one to inherit. Upon the death of the testator the child and grandchildren, then living, took the estate given them by the will, subject however to the estate given to the widow. Upon the death of the widow, said child and grandchildren took their estate "discharged of the trust." The child of the daughter does not become a joint owner with its mother and the other grandchildren. J. M. G.

Cadiz, Ohio.

NOTES.

George Clark, of Waco, has been appointed to fill the vacancy in the Court of Appeals of Texas, caused by the death of Judge Ector.——The first case under the "civil damage" law of Massachusetts has just been decided in the Southern Middlesex District Court by a verdict for $200 damages against a saloonkeeper who furnished liquor to a person who, in resisting arrest for drunkeness, severely injured a policeman.——The Supreme Court of the United States has pronounced unconstitutional the Federal Trade Mark Act.——The New York *Daily Register* says: "Judge Dillon, late of the United States Circuit Court, and the author of a work on Municipal Corporations, contracted with James Cockroft & Co., law publishers of this city, to produce a second edition of this book, stipulating that the edition was not to be stereotyped. The publishers having violated their contract in this respect a replevin suit was brought to recover the stereotyped plates. On the trial, on the 19th inst., before Judge Barrett, in Supreme Court, Circuit, the jury gave Judge Dillon a verdict, awarding him the possession of the plates, with $140 damages for their detention."

A quaint piece of criminal law was disinterred at the recent Maidstone Assizes. A man and his wife, after drinking heavily for eight days, threw themselves into a river, no doubt intending, so far as they were capable of forming an intention, to commit suicide together. The husband was drowned, but the wife escaped, and she was thereupon charged with the murder of her husband. In the beginning of the seventeenth century the judges were perplexed with a similar case (Anon., Moore, 754). A man and his wife, "*ayant long temps vive incontinent*," were in great distress. The husband said to the wife, "I am weary of life and will destroy myself," upon which the wife replied, "If you do, I will too," and thereupon the husband mixed poison with some drink, of which both partook. The husband died, but the wife recovered. According to Moore, the question whether the wife was guilty of murder was considered, but he does not give the decision. Mr. Justice Pattison, however (8 C. & P. 418), evidently referring to this case, says that the wife was acquitted on the ground that she was under the control of her husband. In 1823, in a case (R. v. Dyson, R. & R. 523), where the wife was drowned and the husband escaped, it was held by nine judges that, "if the deceased threw herself into the water by the arrangement of the prisoner, and because she thought he had set her the example, in pursuance of the previous agreement, he was a principal in the second degree, and was guilty of murder;" and in a subsequent case of R. v. Alison (8 C. & P. 418), Mr. Justice Pattison told the jury that "supposing the parties mutually agreed to commit suicide, and one only accomplished that object, the survivor would be guilty of murder in point of law." Following these authorities in the recent case, the lord chief justice, in summing up, told the jury that they must take the law to be that if two persons agreed together to commit self-murder and one of them survived, the survivor was guilty of murder. Happily, however, it was not necessary to put this doctrine into practical application, as the jury seem to have thought that the parties were not in a condition to form a definite intention to commit suicide, and consequently found the woman not guilty.—*Solicitors Journal.*